Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1969

State of Utah, by and Through Its Department of Fish and Game v. United Geophysical Company, A Foreign Corporation : Appellant's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Phil L. Hansen and Kenneth M. Hisatake; Attorneys for Appellant

Recommended Citation
Brief of Appellant, *Utah v. United Geophysical*, No. 11362 (1969).
https://digitalcommons.law.byu.edu/uofu_sc2/3498

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In The Supreme Court of the State of Utah

STATE OF UTAH, by and through its DEPARTMENT OF FISH AND GAME,

Plaintiff and Appellant,

-vs-

UNITED GEOPHYSICAL COMPANY, a Foreign Corporation,

Defendant and Respondent.

Case No. 11362

APPELLANTS' BRIEF

Appeal From a Judgment of the Third District Court
In and for Salt Lake County, Utah
Honorable Leonard W. Elton, Judge

PHIL L. HANSEN
Attorney General

KENNETH M. HISATAKE
Special Assistant to
Attorney General

431 South Third East,
Suite 102
Salt Lake City, Utah 84111

Attorney for Appellant

VAN COTT, BAGLEY
CORNWALL & McCARTHY

141 East First South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Respondent

FILED

TABLE OF CONTENTS

Statutes Cited

TABLE OF CONTENTS)—Continued)

Cases Cited

Authorities Cited

In The Supreme Court of the State of Utah

STATE OF UTAH, by and through its DEPARTMENT OF FISH AND GAME,
Plaintiff and Appellant,
-vs-
UNITED GEOPHYSICAL COMPANY, a Foreign Corporation,
Defendant and Respondent.

Case No. 11362

APPELLANTS' BRIEF

STATEMENT OF CASE

This is an action by the Utah State Division of Fish and Game, the Plaintiff and appellant, against the United Geophysical Company, Defendant and respondent. The Plaintiff brought an action to recover damages for the killing of fish at Bear Lake, Utah, arising from the detonation of explosives by Defendant at Bear Lake. The Plaintiff's action was based on theory of breach of contract and detrimental reliance upon representations made by Defendant.

STATEMENT OF FACTS

In early 1963, the Defendant, United Geophysical Company, contacted the Utah State Division of

Fish and Game to obtain permission to conduct underwater detonations in Flaming Gorge Reservoir and in Bear Lake. The wording of one of the letters addressed to Director Crane, requesting such permission is as follows:

Dear Sir:

"United ElectroDynamics, Inc., under contract to the the United States Geological Survey, is engaged in studying seismic propogation paths and regional travel times in the western United States as a part of the VELA UNIFORM Program of the Advanced Research Projects Agency, Department of Defense. In conjunction with this work, chemical explosions will be detonated at several places in this region and the seismic waves generated by these explosions will be recorded at various distances.

This is a request for permission to use Flaming Gorge Reservoir as one of the shot locations. We also wish to use Bear Lake. The site selected is at Jarvies Canyon, approximately 7 miles upstream from the dam. Four or five shots would be fired on consecutive days, the maximum charge size for any one shot being 6,000 pounds. The program is expected to start May 22, 1963, and continue until May 25 or 26, 1963.

United ElectroDynamics, Inc., assumes responsibility and any resulting liabilities entailed in the use of this reservoir as a shot location.

Permission has been obtained from the Chief Engineer, Bureau of Reclamation, United States Department of Interior, to use Flaming Gorge Reservoir as a shot location. **Any game fish killed as a result of these explosions would be re-stocked by**

United ElectroDynamics, Inc., in a manner that is agreeable to the Utah Fish and Game Department.

Yours truly,

Orville Strozier, Project Manager

Engineering Geophysics Department
United Geo Measurements Division

This letter was one of several received by the Plaintiff from either the United Geophysical Company or the United States Geological Services. The Defendant was engaged in the detonation of explosives and the recording of seismographic readings throughout the United States on a contract with the Geological Services. The Defendants represented, as is shown by the contents of the letter, that they agreed to **"assume responsibility and any resulting liabilities entailed in the use of this reservoir as a shot location."** The Defendant further stated that **any game fish killed as a result of these explosions would be restocked by United ElectroDynamics, Inc., in a manner that is agreeable to the Utah State Division of Fish and Game Department.**

Based upon these and other representations made by the Defendant the Utah State Division of Fish and Game Commission granted permission to the Defendant to conduct the detonations at Bear Lake and Flaming Gorge Reservoir. As a direct result of these explosions a substantial number of indigenous Peak-Nosed Bonneville Cisco were killed and some Lake Trout or Mackinaw and Whitefish were also killed.

In reliance upon the representations, agreements, and promises made by the Defendant, the Plaintiff requested compensation in terms of money for the killing and destruction of fish at Bear Lake; and the Defendant refused to pay, claiming among other things, that no contract had been entered into for the payment of damages and that any representations made by the Defendant was limited to Flaming Gorge Reservoir, and did not apply to Bear Lake. Upon the Defendant's refusal to pay, the Plaintiff demanded that the Defendants restock fish in Bear Lake in a manner suitable to the Plaintiffs. The Defendant also refused to restock in a manner suitable to Plaintiff's claim. The Plaintiff, therefore, initiated action, based upon contract and detrimental reliance made by the Defendants, in an effort to obtain damages for the killing and destruction of the fish.

ARGUMENT

POINT ONE

THE TRIAL COURT ERRORED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT, AND THE PLEADINGS, FILES, RECORDS, AND EVIDENCE BEFORE THE COURT ESTABLISHES SUFFICIENT ISSUES TO BE HEARD BY THE TRIER OF FACTS.

The Defendant's Motion for Summary Judgment was based upon the following alleged defects in Plaintiff's case:

1. No contract existed between the Plaintiff and the Defendant regarding the assumption of liability by the Plaintiff in its use of Bear Lake as a site to detonate explosives.

2. If a contract existed between the Plaintiff and the Defendant regarding the use of Bear Lake as one of the sites to conduct the Defendant's experiments, the contract is impossible of performance because of the peculiarity of the fish involved, and the difficulty to assess market values of the Cisco Fish and the Whitefish defeats the Plaintiff's claim for damages.

3. If the contract existed between the parties in reference to Bear Lake, the contract was too ambiguous to require the Defendant to perform its obligations.

The State of Utah, by and through its Division of Fish and Game is not entitled to bring a lawsuit as owners of the fish destroyed.

5. Cisco Fish is not a game fish and the contract was limited to compensation for destruction of game fish.

6. No injury was sustained by the State of Utah.

The arguments submitted by the Defendant enumerated as numbers 1, 2, and 3, which relate to the question of contract and interpretation of contract, will be answered together under one heading; and the arguments submitted by the Defendant

shown as numbers 4, 5, and 6 will be answered individually.

Contracts

Plaintiff does not rely solely upon the letter from Defendant dated May 9, 1963, as the entire contract. First, there appears to be substantial confusion in Defendant's own opinion as to exactly what its written contract in the letter of May 9, 1963, does mean. Defendant now contends that the letter-contract refers only to Flaming Gorge Reservoir, yet the letter specifically states that "We also wish to use Bear Lake." Defendant now contends the letter-contract refers only to **restocking** any game fish killed as a result of these explosions, yet the letter also "assumes **responsibility** and **any resulting liabilities** entailed in the use of this reservoir as a shot location."

Obviously, on its face the letter of May 9, 1963, is ambiguous and confusing. It could not possibly form the written instrument embodying all aspects of the parties' agreement, necessary for the application of the parol evidence rule. It is well established that before there can be a valid application of the parol evidence rule, there must be in existence, a writing which is susceptible to interpretation as to what exactly it means.

> "No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation it is determined that the writing means." **Corbin on Contracts,** Sec. 579 (1960).

The Utah Court has said, referring to a written contract assignment:

> "Whenever uncertainty or ambiguity exists with respect thereto it is proper for the Court to consider all the facts and circumstances, including the word and actions of the parties forming the background of the transaction." **Radley vs. Smith,** 6 Utah 2nd 314, 313 P. 2nd 465 (1967).

It seems obvious then that **all communications and correspondence** must be referred to in order to interpret the terms of the agreement entered into and that when this is done, Defendant agreed to assume full responsibility for damages arising out of the use of Bear Lake and Flaming Gorge Reservoir as shot sites for their study.

Secondly, the evidence is undisputed that sometime subsequent to the receipt of the May 9, 1963, letter the Defendant's agent, in a telephone conversation with the then Fish and Game Director, Harold S. Crane, gave extensive verbal assurances that losses in Bear Lake would be minimal and that, in any event, Defendant would assume full responsibility for any losses. (See deposition of Harold S. Crane, Page 9, lines 25 forward.) It is certainly well established that the parol evidence rule does not relate to and does not prevent proof of oral contracts entered into subsequent to the formal written contract, varying or discharging the written agreement. (See **3 Williston on Contracts,** Sec. 632 (3rd Edition); **Simpson Handbook on the Law of Contracts,** Sec. 63, (1954).

If, as the Defendant contends on one hand, no agreement was entered into with regard to the damage done in Bear Lake in the letter of May 9, 1963, then the subsequent conversations between Defendant's agent and Director Crane, constituted a separate oral contract. Defendant may not exclude these conversations from the contract on parol grounds and still contend that no agreement was made. Obviously, such an agreement was made because Defendant went ahead with its blasting. The agreement contained in the letter of May 9, 1963, is either modified by the subsequent conversations to include both greater assurances and assurances as to Bear Lake or the conversations comprise a separate oral contract relating to Bear Lake alone.

The rule is that subsequent agreements may be shown by parol evidence and are not barred or rendered ineffective by a prior writing. (See **3 Williston on Contracts,** Sec. 632 (3rd Edition); **3 Corbin on Contracts**, Sec. 594, (1960).

The Defendant may not have its cake and eat it both since it is inconceivable that Plaintiff would consent to detonation of Twelve Thousand (12,000) Pounds of high explosives in any fishery waters of the State of Utah without assurances regarding possible damage to the fishery involved. In fact, the Plaintiff did so only on the assurances of the United States Government and Defendant; first, that Defendant was a reputable and honorable concern; and second, that Defendant would assume full responsibility for all resulting damages. Defendant

should not now be heard to say that this reliance was unwarranted in both regards.

Finally, it would seem ironical if a party were permitted to take advantage of ambiguity created by him to defeat a contract which he has benefitted from. However, the decisions clearly show that a party may not use ambiguity created by him to immunize himself against an action for redress of a breach of contract. In **Maw vs. Noble,** 354 P. 2nd 121, 10 Utah 2nd 440, the Court stated:

> **"We are in agreement with the recognized rule urged by the Defendants that where there is uncertainty or ambiguity the contract should be strictly construed against him who draws it."**

If the contract is in fact ambiguous as claimed by the Defendants such ambiguity should be construed against it as the drafter or the proposer of the contract.

Valuation Of Property Having No Market Value Because Of Its Peculiar Nature.

The Defendant contends, among other things, that the Plaintiff's case must fail because of the impossibility of determining damages of the fish killed due to the peculiar nature of the peak-nosed Bonneville, Cisco, the Rocky Mountain Whitefish, and the Lake Trout or Mackinaw, and because these fish are not ordinarily sold on the market and, therefore, have no established market value.

The Courts have long since established a rule, however, which permits a party to testify as to actual, intrinsic or subjective values where the value of the item, because of its peculiarity, cannot be assessed by the ordinary rule of market value.

The Utah precedent was apparently set in **Kamas Security Company vs. Taylor,** 226 P. 2nd 111, 119 Utah 241. In that case the Utah Supreme Court, in permitting the lower Court to assess damages on the basis of intrinsic value, stated:

> "The mere fact that the market value could not be shown by reason of the want of any listing on the Stock Exchange, and that there was only occasional transfer of this type of stock could not preclude Plaintiff from recovering judgment for more than nominal damage. The trial court was entitled to make a finding of value based on intrinsic worth of the stock. Although market value is a general criterion of value, it is not the sole criterion."

The same rule was stated differently in **Park vs. Moorman Manufacturing Company, et al.,** 241 P. 2nd 914, 121 Utah 339. The Court in approving the use of a method of valuation, other than market value, **stated:**

> "A problem arises, however, where, as in this case, there is no market value of the property destroyed since laying hens above the age of five months are not generally available, and a market value must be arrived at by a process of computation. Hence, in order to determine the value of Plaintiff's loss, we must start with a base and compute the incidentals which would be included in a market price of the

destroyed object if it had been obtainable on the open market."

This rule, as established by the Supreme Court of Utah, is a confirmation of the general rule accepted by all of our sister states. The general rule is clearly stated in 22 **AM. JUR.** 2nd 214, **Damages,** Section 249.

"There are many instances in which the item of personal property destroyed, injured, or taken has no market value in the normal sense of that term. A family photograph, a specially designed machine, a manuscript, some lecture notes, and plans of a draftsman can be examples of items of personal property which have no market value beyond the value of the paper or material which went into their construction. These items are not bought and sold on the open market, and continued adherence to the rule of damages which allows recovery only for a decrease in 'market value' would result in awarding the Plaintiff only nominal damages even though the court is convinced that the injury is substantial. In this type of case, the concept of measuring damages by the market value of the item, destroyed, injured, or taken is often discarded by the courts. The rule most frequently adopted for these cases is to award either the 'actual' or 'intrinsic' value of the item or the 'value to the owner' of the item."

The Right Of The Utah Division Of Fish And Game To Sue For Loss Or Destruction Of Fish.

There is no merit to the contention that the State of Utah has no property rights in fish therein. The Utah State Legislature has expressly stated:

"All Game and fish now and hereinafter within this state, not held by private ownership legally ac-

> quired, and which, for the purpose of this law, shall include all game animals, game birds, water fowl, fish, amphibians, and fur-bearing animals, mentioned in this law **are expressly declared to be the property of the State,** . . . . Utah Code Annotated, 1953, 23-1-10. (Emphasis added)

There should be little dispute that even without a statutory declaration as to the ownership of wildlife, that all wildlife within each state are held in trust, by the state government, for the people of that state. Logically, the state agency which is responsible for the maintenance of the wildlife should be entitled to maintain an action in behalf of the public of that state.

Definition Of Game Fish

Cisco fish have long been regarded as game fish by the Utah Fish and Game Department because they are members of the Whitefish family, Prosopium. See Sigler & Miller, **Fishes of Utah,** P. 185, (1963). If this is not sufficient, then under the law of the State of Utah, the sole test of whether or not Cisco Fish are game fish is whether or not they have been so declared by the Utah State Fish and Game Commission.

> "Game fish means all species of **Trout, Bass, Salmon, Pike, Catfish, Crappie, Whitefish,** Grayling, and **such other species** as may be declared game by

> the Commission and which are not raised in private fish hatcheries." Utah Code Annotated, 1953, 23-1-9, Para. 11. (Emphasis added).

Angling regulations and bag limits were set for Bonneville Cisco as game fish by the Utah Fish and Game Commission in its official proclamation dated December 23, 1959. (See **Utah Fish and Game Department,** 1960, **Angling Regulations,** Para. A-3-c and A-3-h.) Any inquiry into the method of taking as a means of defining game fish would lead to the absurd result that many species would sometimes be game fish and sometimes not, since many are frequently legally taken by methods involving neither rod nor reel.

Damages

Whether or not the Cisco, Whitefish, or Lake Trout populations were damaged or their spawning beds injured are questions of fact upon which evidence will be adduced at trial. The indisputable fact is that an exceedingly large number of game fish were killed by the Defendant's activities. The question of whether or not the State of Utah suffered any damage by reason of Defendant's activities and if so, how much, are questions to be answered at trial and are not susceptible to disposition at pretrial proceedings. Surely the fish killed and destroyed have value, irrespective of the peculiar na-

ture of the species. The determination of this question is without doubt, a justiciable question of fact for a jury.

CONCLUSION

The Plaintiff submits that there is ample evidence to show the following:

1. That the Utah Division of Fish and Game, as Trustees of wildlife for the people of the State of Utah is entitled to sue for injury and destruction of the wildlife resources. To hold otherwise would be to deny the state's right to recover for illegal acquisition of minerals, ores, gas, oil, or water rights on state lands.

2. That a contract existed between the parties which consists of verbal as well as written representations which is sufficient to determine the intent of the parties.

3. That the Plaintiff is entitled to show or attempt to show what damages it suffered by showing intrinsic or personal value.

4. That all fish for which recovery or compensation is sought are game fish.

The Plaintiff respectfully submits that there are numerous issues raised by the pleading which must

be disposed of by trial and that the trial court errored in granting the Defendant's Motion For Summary Judgment, and this case should be remanded to the District Court for trial of the issues.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

KENNETH M. HISATAKE
Special Assistant to
Attorney General

431 South Third East,
Suite 102
Salt Lake City, Utah 84111

Attorney for Appellant